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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY HAMMOND,

Defendant and Appellant.

B271293

(Los Angeles County
Super. Ct. No. BA422855)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval and Dorothy B. Reyes, Judges. Reversed and remanded with directions.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Los Angeles police officers detained Jeffrey Hammond for a traffic violation. They searched his van, his person, and a tattoo shop from which they had seen him leave. They discovered marijuana in the van, cocaine in his pockets, and guns in the tattoo shop.

When Hammond moved to suppress this evidence at his preliminary hearing, the preliminary hearing court denied the motion. Hammond unsuccessfully renewed the motion in the trial court. Hammond then pleaded no contest to unlawful transportation or sale of marijuana in violation of Health and Safety Code section 11360, subdivision (a), possession for sale of a controlled substance in violation of Health and Safety Code section 11351, and possession of a firearm by a felon in violation of Penal Code section 29800, subdivision (a)(1). The court placed him on formal probation with various terms and conditions, including serving 365 days in county jail.

Hammond challenges the constitutionality of the detention and the searches of his van, himself, and the tattoo shop. We reverse and remand for a new hearing on Hammond's motion to suppress the evidence seized from the search of the shop.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Detention and the Searches*

Officer Michael Hofmeyer and his partner were near a tattoo shop on 2206 South San Pedro Street. The officers had "received information" Hammond was selling drugs there. Officer Hofmeyer observed Hammond walk out of the tattoo shop

and get into a parked van. The front windows of the van were tinted “to the point of not really being able to see inside of the van to see who was inside,” and when Hammond got into the van Officer Hofmeyer was unable to see him. Hammond made a U-turn and drove down the street, where he double-parked the van 50 to 75 yards east of San Pedro Street. He got out of the van, went into a parked truck, and moved the truck one car length forward. Hammond then got out of the truck.

The officers got out of their patrol car, displayed their badges, and began speaking to Hammond. Officer Hofmeyer’s partner told Hammond why the officers had stopped him, and they asked for his registration and driver’s license. Hammond “was very upset” and “very belligerent,” asked why the officers had stopped him, and accused them of harassing him. Although Hammond engaged in a “verbal altercation” with the officers, he did not threaten them. Hammond showed the officers his driver’s license, told the officers his registration and license were inside the van, and offered to retrieve them. Officer Hofmeyer’s partner told Hammond he could not go inside the van, but the officers would retrieve the registration from the van. The officers prohibited Hammond from getting the registration “for officer safety” reasons because they were concerned there might be weapons inside the van.

The officers placed Hammond in handcuffs “once he became belligerent” and was “yelling” at them. Hammond told the officers he did not want the officers to retrieve the documents from his van and he asked the officers to call a supervisor. After two supervisors arrived, Officer Hofmeyer walked to the van and “immediately when [he] opened up the van [he] smelled a strong [odor] of marijuana.” Officer Hofmeyer searched the van and

discovered a large bundle on the folded-down back seat. He cut it open and saw a compressed plant-like material resembling and smelling like marijuana.

The officers arrested Hammond and searched him. They recovered from the pockets of his shorts a plastic sandwich bag, containing a white powdery substance resembling cocaine, and \$1,145 in cash. Officer Hofmeyer concluded Hammond possessed the drugs with the intent to sell because of the “sheer quantity” of the drugs, the absence of any paraphernalia used to smoke marijuana, and the fact the money the officers found was in miscellaneous denominations.

Officer Hofmeyer’s partner asked Hammond if the officers could search the tattoo shop. Officer Hofmeyer could not recall the exact words Hammond used, but testified that Hammond, who “had calmed down somewhat by then,” said, “Yes, go ahead and search it. Anything that you find in there is mine.” The officers did not ask Hammond whether he owned the tattoo shop.

The officers searched the shop and found boxes containing three handguns. Inside one of the boxes was paperwork with Hammond’s name on it and the address of 2206 South San Pedro Street. The officers also found paperwork in the shop with the names of other people. The officers ran a check on the guns and found that none of them was stolen or registered to Hammond.

B. *The Motion To Suppress*

Following his arrest, Hammond filed a motion to suppress under Penal Code section 1538.5 in the preliminary hearing court. At the hearing on the motion to suppress, counsel for Hammond objected to Officer Hofmeyer’s testimony that Hammond gave the officers permission to search the tattoo shop

and that Hammond said anything they found was his. The trial court sustained Hammond's objection to the admission of his statement that the officers could search the tattoo shop because they obtained it in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Counsel for Hammond also asked the court about having Hammond testify only about the search of the tattoo shop and whether he gave consent to the search, with a corresponding limitation on the scope of cross-examination:

"[Counsel for Hammond]: I may put on my client for a limited question as to whether he gave consent to search the shop. But before I get there, I will like to argue what we have done so far, because I can ask him one question and they have no right to go into –

"The Court: Yes, they do. If he is on the stand and he testifies, they can ask him what they wish.

"[Counsel for Hammond]: I can put him [on] for the limited purpose of the search.

"The Court: That's your choice.

"[Counsel for Hammond]: But they can't – All right. Will you stipulate he'll testify that he did not give permission?

"[The Prosecutor]: No.

"

"[Counsel for Hammond]: Then it will be beyond the scope – that's the only question I'm going to ask him.

"The Court: That's your choice and it's his right to testify or not.

"[Counsel for Hammond]: I understand that, but they have no right to go into the entire scenario of events as to what he owns, what he doesn't own. I'm only putting him on for this

limited issue. I want to make that clear. I have cases that will suggest that's the law.

"The Court: That's not the law. And if you want to put your client on, he agrees to testify, that's fine, but you can't decide what they're going to ask him.

"[Counsel for Hammond]: I understand that, but I am not putting him on for all purposes.

"The Court: But that's your choice.

"[Counsel for Hammond]: I'm not putting him on under those circumstances."

Counsel for Hammond argued that Hammond did not give the officers consent to search the van and that the court should suppress the evidence the officers seized, including the bundle of marijuana and the cocaine in Hammond's pocket. Counsel for Hammond further argued that any consent Hammond may have given to search the tattoo shop was invalid because the arrest was illegal. Finally, counsel for Hammond argued that, because the officers found paperwork in the tattoo shop belonging to other individuals, the court could not conclude Hammond possessed the guns.

The prosecutor argued that officer safety justified the officers' entry into the van to retrieve the vehicle registration and that the search of Hammond's person was a valid search incident to his arrest for possession of marijuana. Finally, with respect to the search of the tattoo shop, the prosecutor argued that, after the court struck Hammond's statement that anything the officers found in the tattoo shop was his, Hammond could not move to suppress evidence of the guns because he had no reasonable expectation of privacy in the shop.

The court denied the motion to suppress. The court ruled there was “probable cause” for the stop, given Officer Hofmeyer’s testimony describing the illegal U-turn and double-parking. Noting the “dark tinting” on the windows of the van precluded the officers from “see[ing] inside the van,” the court ruled it was “reasonable” for the officers to retrieve the registration and proof of insurance “in light of officer safety.” The court further stated there was “probable cause” to search the van. As for the guns, the court ruled that, although there was no evidence Hammond owned the tattoo shop, there was evidence he possessed at least one of the guns because the officers discovered a letter addressed to Hammond in the box where they found the gun.

C. *The Renewed Motion To Suppress and the Motion To Set Aside the Information Under Penal Code Section 995*

Pursuant to Penal Code section 1538.5, subdivision (i), Hammond renewed his motion to suppress in the trial court before a different judge, and he filed a motion to set aside the information pursuant to Penal Code section 995. Counsel for Hammond informed the court that Hammond wanted to withdraw his objection to Officer Hofmeyer’s testimony that Hammond told the officers they could search the tattoo shop and that Hammond told them anything they found inside was his, so that Hammond could establish he had a reasonable expectation of privacy in the shop and make a Fourth Amendment challenge. The court ruled that neither side would be prejudiced by allowing Hammond to withdraw his objection, and the court admitted Hammond’s statement for the purpose of ruling on the renewed motion to suppress.

Counsel for Hammond argued to the trial court that the officers had no basis for retrieving the registration and insurance documents and there were no specific facts showing Hammond was belligerent. The prosecutor argued the officers had legitimate safety concerns about allowing Hammond to go into the van to retrieve his registration and proof of insurance, and they acted reasonably in waiting to enter the van until their supervisor arrived. The trial court noted the transcript of the preliminary hearing showed Hammond was “uncooperative” and “belligerent.” The court denied both the renewed motion to suppress and the motion to set aside the information, stating, “I’ve carefully detailed what I believe the factual situation precursors were to this stop and this search and this arrest and carefully laid out the record of what I believe is support[ed] here and not supported by the record. Although I believe it’s a close call, I will deny the [motions].”¹

¹ Hammond also filed a “nonstatutory motion to dismiss” on the grounds his prior trial counsel was ineffective and the ineffectiveness deprived him of a substantial right. The trial court denied this motion. Hammond’s opening brief makes one reference to the trial court’s denial of this motion to dismiss in a section heading but does not provide any further factual specificity, citation to authority, or argument. As a result, Hammond forfeited any argument the trial court erred in denying this motion. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

DISCUSSION

A. *Standard of Review*

When a defendant makes a motion to suppress at the preliminary hearing, the court makes factual findings, weighs the evidence, determines credibility, and makes appropriate inferences. (*People v. Romeo* (2015) 240 Cal.App.4th 931, 941.) If the preliminary hearing court denies the motion, the defendant must, to preserve his or her right to appellate review of the ruling, renew the motion in the trial court, where the evidence is limited to the transcript of the preliminary hearing and any new evidence the defendant could not reasonably have presented at the preliminary hearing. (*Ibid.*; see Pen. Code, § 1538.5, subd. (i).) The prosecution has the burden of proving by a preponderance of the evidence that the warrantless search or seizure was justified. (*People v. Johnson* (2006) 38 Cal.4th 717, 729.)

On appeal from an order denying a motion to suppress, we review the express or implied factual findings of the preliminary hearing court for substantial evidence. (*People v. Romeo, supra*, 240 Cal.App.4th at p. 941.) “On review of the superior court ruling by appeal or writ, a two-step standard of review applies. In the first step of our review, ‘we in effect disregard the ruling of the superior court and directly review the determination of the [preliminary hearing court].’ [Citation.] At this stage, we consider the record in the light most favorable to the People since ‘all factual conflicts must be resolved in the manner most favorable to the [superior] court’s disposition on the [suppression] motion.’” (*Ibid.*) We accept as established all implied or express findings supported by substantial evidence and “then proceed to

measure those findings against Fourth Amendment standards” (*Ibid.*; see *People v. Strider* (2009) 177 Cal.App.4th 1393, 1398 “[w]e exercise our independent judgment to determine whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment”).)

B. *Hammond Was Not Arrested Before the Police Searched His Van*

Hammond argues: “Because the drugs, guns, and other evidence were products of [an] illegally prolonged detention, arrest, and illegal searches, they must be excluded as poisonous fruit of the Fourth Amendment violations.” Specifically, Hammond argues that, both by handcuffing him and by failing to diligently pursue the traffic investigation and thus illegally prolonging the detention, the officers converted the detention into a de facto arrest.² He also contends the preliminary hearing court’s findings “relating to the stop and arrest” were not supported by substantial evidence. We conclude that Hammond’s

² The People contend that, “because appellant did not argue below that his detention resulted in a de facto arrest, he forfeited the claim.” Hammond, however, raised in the trial court both bases for his de facto arrest argument. At the hearing on Hammond’s renewed motion to suppress, counsel for Hammond argued the officers handcuffed Hammond after he exercised his “First Amendment rights” in arguing with the officers, even though, according to his testimony, Officer Hofmeyer was not threatened. In his written motion to suppress, Hammond argued the officers “could have contacted the DMV” to obtain information necessary for the citation. Although counsel for Hammond did not use the specific words “de facto arrest,” he came close enough to avoid forfeiture of the argument.

detention did not amount to an arrest and that substantial evidence supports the preliminary hearing court's findings.

1. *The Initial Stop Was Reasonable*

The Fourth Amendment prohibits seizure of persons, including brief investigative stops, when they are unreasonable. (*Terry v. Ohio* (1968) 392 U.S. 1, 19 & fn. 16; *People v. Casares* (2016) 62 Cal.4th 808, 837-838.) Because it is less intrusive than an arrest, the temporary detention of a person for the purpose of investigating possible criminal activity may be based on "some objective manifestation" that there is criminal activity and that the person stopped by the police is engaged in that activity. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 56; *People v. Souza* (1994) 9 Cal.4th 224, 230.) "Ordinary traffic stops are treated as investigatory detentions for which the officer must be able to articulate specific facts justifying the suspicion that a crime is being committed." (*People v. Suff* (2014) 58 Cal.4th 1013, 1054.) "A seizure for a traffic violation justifies a police investigation of that violation." (*People v. Espino* (2016) 247 Cal.App.4th 746, 756, citing *Rodriguez v. United States* (2015) 575 U.S. ___, ___, 135 S.Ct. 1609, 1614.)

Substantial evidence supports the preliminary hearing court's finding that the officers had "probable cause" to detain Hammond for making an illegal U-turn (a violation of Vehicle Code section 22102) and double-parking his van (a violation of Vehicle Code section 22500, subdivision (h)). Officer Hofmeyer testified that he observed these traffic violations prior to detaining Hammond, and on appeal Hammond does not challenge the traffic violations or the initial stop to investigate those violations. (See *People v. Nice* (2016) 247 Cal.App.4th 928, 937-938 ["a lawful traffic stop occurs when the facts and

circumstances known to the police officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or another law”].)

2. *Handcuffing Hammond Did Not Convert His
Detention into an Arrest*

“[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests.” (*People v. Celis* (2004) 33 Cal.4th 667, 674.) We decide the issue based “on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.” (*Ibid.*, citing *United States v. Sharpe* (1985) 470 U.S. 675, 685-688.) Officers may take reasonable measures to minimize the risk of physical harm and to determine whether the person in question is armed. (*Terry v. Ohio, supra*, 392 U.S. at p. 24; accord, *People v. Superior Court* (1980) 27 Cal.3d 670, 673, fn. 2; see *King v. State of California* (2015) 242 Cal.App.4th 265, 283 [officer need not be absolutely certain an individual is armed; the issue is whether a reasonably prudent person under the circumstances would reasonably believe he or she or others are in danger].)

The use of handcuffs, when objectively reasonable, does not, without more, necessarily convert a detention into a de facto arrest. “[B]ecause a police officer may take reasonable precautions to ensure safe completion of the officer’s investigation, handcuffing a suspect during a detention does not necessarily transform the detention into a de facto arrest.” (*People v. Stier* (2008) 168 Cal.App.4th 21, 27; see, e.g., *People v. Celis, supra*, 33 Cal.4th at p. 676 [stopping the defendant at

gunpoint, handcuffing him, and making him sit on the ground while officers walked through the house to assess danger was not an arrest]; *People v. Bowen* (1987) 195 Cal.App.3d 269, 272-274 [handcuffing the defendant to a guardrail for 25 minutes while waiting for the victim to arrive and make an identification was not an arrest]; *Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [handcuffing a belligerent defendant who was yelling at officers did not convert detention into de facto arrest].) The primary factor in assessing whether handcuffing amounts to an arrest is whether the officer had “a reasonable basis to believe the detainee presented a physical threat to the officer or would flee.” (*People v. Espino, supra*, 247 Cal.App.4th at p. 759.)

Here, the officers were reasonably justified in handcuffing Hammond when he became “belligerent” and started “yelling” at them. In addition, the tinted windows on Hammond’s van prevented the officers from seeing whether there were weapons inside that Hammond could use against the officers. And the officers had received information that Hammond had been selling drugs out of a tattoo shop at the exact location the officers found him. Such vigilance for the presence of firearms was particularly reasonable in light of Officer Hofmeyer’s experience in apprehending suspected drug dealers. (See *People v. Nice, supra*, 247 Cal.App.4th at p. 937 [“[a]n officer is entitled to rely on his training and experience in drawing inferences from the facts he observes”].) When determining the reasonableness of the officer’s actions, “due weight must be given, not to his inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences which he is entitled to draw from the facts

in light of his experience.” (*People v. Rios* (2011) 193 Cal.App.4th 584, 599.)

Hammond asserts he never threatened the officers. He cites no authority, however, for the proposition that threats are a prerequisite to placing handcuffs on a suspect. The critical inquiry is an officer’s reasonable concern for safety or risk of flight. (*People v. Espino, supra*, 247 Cal.App.4th at p. 759.) The facts objectively supported Officer Hofmeyer and his partner’s reasonable concerns for their safety and justified their use of handcuffs before continuing with their investigation.

Referring to the trial court’s ruling, Hammond contends “the court’s findings relating to the stop and arrest were not supported by substantial evidence” because the trial court “repeatedly recited inaccurate facts that appellant was uncooperative and refused to give the officers information” As noted, however, we do not review the trial court’s factual findings for substantial evidence; we review the preliminary hearing court’s factual findings for substantial evidence. (*People v. Romeo, supra*, 240 Cal.App.4th at p. 941; see *People v. Ramsey* (1988) 203 Cal.App.3d 671, 679 “[b]ecause the superior court is the reviewing court rather than the fact-finding court, the appellate court no longer reviews the findings of the trial court”].) In doing so, we “must infer ‘a finding of fact favorable to the prevailing party on each ground or theory underlying the motion.’” (*People v. Munoz* (2008) 167 Cal.App.4th 126, 132-133.) The preliminary hearing court did not make an express finding regarding Hammond’s demeanor. Nevertheless, there was substantial evidence at the preliminary hearing to support the court’s implied finding that Hammond was combative, belligerent, and uncooperative.

3. *The Officers Did Not Unreasonably Prolong
Hammond's Detention*

Hammond argues that the length of his detention amounted to a de facto arrest. He contends the officers, while they were waiting for the supervisors to arrive, could have, but failed to, run checks with the Department of Motor Vehicles using a computer, which he argues shows their lack of diligence in performing their investigation.

In assessing whether a detention extended beyond an investigative stop, the crucial question is whether the police “diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” (*United States v. Sharpe, supra*, 470 U.S. at pp. 686-687.) Delay due to reasons beyond the officer’s control do not make the length of the detention unreasonable. (See, e.g., *id.* at pp. 687-688 [delay attributable to evasive actions of the defendant]; *People v. Williams* (2007) 156 Cal.App.4th 949, 960 [detention not unnecessarily prolonged because of the remote location of the marijuana field where the defendant was detained]; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577 [delay caused by the need to summon a Spanish-speaking officer was not unreasonable]; *People v. Huerta* (1990) 218 Cal.App.3d 744, 751 [false information given by the defendant contributed to the length of the detention].) Hammond insisted on the presence of a supervisor before the officers could proceed with their investigation. He also drove a van with tinted windows that made it unsafe for the officers to allow him back inside his vehicle. Responding to the situation, the officers called two supervisors in their effort to “diligently pursue[]” (*United States*

v. Sharpe, supra, 470 U.S. at pp. 686-687) their investigation under the restrictions imposed by Hammond.

“In assessing whether a detention is too long in duration,” the court “should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. [Citation.] A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” (*United States v. Sharpe, supra*, 470 U.S. at pp. 686-687.) That the officers here theoretically could have found other ways to check for registration and proof of insurance when faced with the demands of the situation does not make the detention unreasonable.

C. *The Search of the Van Did Not Violate the Fourth Amendment*

Hammond contends the officers illegally opened the door to his van instead of allowing him to retrieve his registration and proof of insurance. A warrantless search and seizure is presumed to be unlawful, and the prosecution has the burden of justifying it. (*People v. Schmitz* (2012) 55 Cal.4th 909, 915-916.) Here, however, the officers’ legitimate concerns for their safety justified opening the door to the van without a warrant.

The officers first properly asked Hammond for his registration and proof of insurance. (See *Rodriguez v. United States, supra*, 575 U.S. at p. ____ [135 S.Ct. at p. 1615] [legitimate tasks incident to a traffic stop include “checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration

and proof of insurance”].) The officers then reasonably prohibited Hammond from going back into his van to retrieve the requested documents because the van’s windows were tinted and the officers could not see if anyone or anything was inside. The officers’ inability to see whether Hammond would have access to a weapon if he were to retrieve the registration and proof of insurance justified the officers’ decision to retrieve the documents themselves. (See *People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1290, fn. 7 [recognizing officer safety as factor for Vehicle Code provisions regulating window tinting]; *U.S. v. Stanfield* (4th Cir. 1997) 109 F.3d 976, 984 [tinted windows may reasonably cause an officer to become concerned about his or her safety].) As Officer Hofmeyer testified, he did not know if there were any weapons inside the van that Hammond might use to harm him and his partner. (See *United States v. Newell* (8th Cir. 2010) 596 F.3d 876, 880 [“officers were not required to hope [the defendant] was not arming himself behind the heavily-tinted windows while they asked him to roll down the window or step out of the [car]”].)

The officers also acted properly in going into Hammond’s van to retrieve his registration and proof of insurance. An officer may remove registration and insurance documents from a vehicle where his or her safety is at risk. (See, e.g., *People v. Webster* (1991) 54 Cal.3d 411, 431 [for his safety it was reasonable for an officer to remove occupants from the car and personally search for the registration]; *People v. Hart* (1999) 74 Cal.App.4th 479, 490-491 [safety concerns justified an officer in locating documents himself and preventing driver from rummaging through glove compartment]; *People v. Faddler* (1982) 132 Cal.App.3d 607, 610 [an officer may order a driver and boisterous occupants out of car and retrieve registration documents].) The tinted windows,

coupled with Hammond's belligerence at the outset of the detention, heightened the officers' concern for their safety and justified their entry into the van to retrieve the documents.

Hammond argues that the officers should have asked him about the location of the documents in the van before they opened the door and that less intrusive means, such as a radio check, would have accomplished the same purpose as a visual inspection of the documents. The first argument does not assist Hammond because the officers smelled the marijuana "immediately" upon opening the door to the van. Even if the officers had asked Hammond where his registration and proof of insurance documents were, the officers still would have opened the door and smelled the marijuana. As for the second argument, Hammond cites no authority requiring officers to electronically check the status of a vehicle's registration or confirm proof of insurance when paper documents readily available at the scene suffice. Requiring officers to engage in alternative methods of investigation would be indulging in the kind of "unrealistic second-guessing" the United States Supreme Court and California Supreme Court have disapproved. (*United States v. Sharpe, supra*, 470 U.S. at p. 686; see *People v. Brown* (2015) 61 Cal.4th 968, 984 ["[p]olice officers are required to make 'swift, on-the-spot decisions' and the Fourth Amendment does not require us to 'indulge in 'unrealistic second-guessing'' of the officer's conduct"].)

Because the officers were justified in opening the door to the van, the immediate odor of marijuana gave them probable cause to search the van. (See *People v. Waxler* (2014) 224 Cal.App.4th 712, 719 [deputy "had probable cause to search defendant's car for marijuana after he smelled the odor of

marijuana”]; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059 [police officers had probable cause to search a car when they smelled marijuana immediately after the defendant opened the driver’s side door]; see also *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1254 (conc. opn. of Liu, J.) [it is a “settled proposition that the smell of marijuana can establish probable cause to search and, in the context of an automobile search or exigent circumstances, can provide a sufficient basis to proceed without a warrant”]. Therefore, the search of the van did not violate the Fourth Amendment.

D. *The Search of Hammond Was a Lawful Search
Incident to Arrest*

Hammond argues in passing that the search of his person was illegal. The officers’ search of Hammond, however, was lawful. The officers, after they discovered the marijuana in the van, had probable cause to arrest Hammond for possession for sale or transportation of marijuana. Therefore they were justified in searching Hammond incident to the arrest. (See *United States v. Robinson* (1973) 414 U.S. 218, 224; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1213 [“[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification”]; *People v. Diaz* (2011) 51 Cal.4th 84, 90 [“[o]ne of the specifically established exceptions to the Fourth Amendment’s warrant requirement is ‘a search incident to lawful arrest,’” which “has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained”], disapproved on another ground in *Riley v. California* (2014) ____

U.S.____, 134 S.Ct. 2473; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075 “[a]n officer may thoroughly search an individual incident to a lawful arrest”).)

E. *The Preliminary Hearing Court’s Statement
It Would Not Restrict Cross-Examination If
Hammond Testified Denied Hammond a Full and
Fair Opportunity To Challenge the Search of the
Tattoo Shop*

As noted, counsel for Hammond advised the preliminary hearing court he wanted to put Hammond on the witness stand “for a limited question as to whether he gave consent to search the shop” and “for the limited purpose of the search,” and he asked the court to limit cross-examination accordingly. The court ruled that, if Hammond testified on the issue of consent to search the tattoo shop, the prosecutors could ask Hammond whatever “they wished.” Counsel for Hammond decided against calling Hammond “under those circumstances.” Hammond argues the preliminary hearing court “denied [him] the opportunity to present evidence to challenge the search” by ruling that Hammond’s cross-examination “could not be limited to the search of the tattoo shop,” and erred in ruling Hammond “could not present testimony limited to search and seizure issues.” Hammond’s argument has merit.

A defendant who chooses to testify is not immune from cross-examination, and the scope of permissible cross-examination is “very wide.” (*People v. Harris* (1981) 28 Cal.3d 935, 953; see *People v. Farnam* (2002) 28 Cal.4th 107, 187 [trial court has “wide discretion in controlling the scope of relevant cross-examination”]; *People v. Lena* (2017) 8 Cal.App.5th 1145, 1149 [if the defendant testifies, the prosecutor may cross-examine

him to test his credibility or otherwise refute his statements].) Thus, after the defendant testifies, the prosecutor “may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.” (*People v. Chatman* (2006) 38 Cal.4th 344, 382.)

Nevertheless, the scope of cross-examination is not unlimited. “A defendant who takes the stand to testify in his own behalf waives the privilege against self-incrimination,” but only “to the extent of the scope of relevant cross-examination.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 72.) “A defendant in a criminal case . . . may not be examined by a cross-examiner beyond the scope of the direct examination” because “[t]o permit the prosecutor to exceed the scope of the direct examination in examining a criminal defendant would amount to forcing such defendant to become the prosecution’s witness.” (*People v. James* (1976) 56 Cal.App.3d 876, 887; see *People v. Wilson* (2008) 44 Cal.4th 758, 799 [“[a] defendant who elects to testify does not give up his Fifth Amendment rights nor his corresponding California privilege against self-incrimination . . . except as to matters within the scope of relevant cross-examination”]; *People v. Tealer* (1975) 48 Cal.App.3d 598, 604 [“[e]ven when a defendant chooses to offer testimony on his own behalf, the privilege against self-incrimination serves ‘to prevent the prosecution from questioning the defendant upon the case generally’”]; *People v. Bagwell* (1974) 38 Cal.App.3d 127, 140 [cross-examination on an unrelated offense not referred to on direct examination exceeds the permissible scope and violates the defendant’s rights under the Fifth and Fourteenth Amendments].) This rule applies to a hearing on a motion to suppress. (See *People v. Drews* (1989) 208 Cal.App.3d 1317,

1325, fn. 6 [“[t]estimony given by the defendant at a hearing pursuant to Penal Code section 1538.5 should be, of course, carefully limited to the issues raised by the suppression motion”]; see also *People v. Williams* (1973) 30 Cal.App.3d 502, 510 [if the defendant chooses to testify about the contents of declaration submitted in support of a motion to dismiss for delay in prosecution, the court should limit cross-examination to the declaration].)

The preliminary hearing court’s ruling that the prosecutor could ask Hammond whatever he wanted to ask on cross-examination was error. The court essentially gave blanket approval, in advance, to any questions the prosecutor might ask, even if they went beyond the scope of Hammond’s direct testimony. At a minimum, the court should have waited to hear the questions the prosecutor asked on cross-examination before ruling on their propriety. As a result, the preliminary hearing court’s ruling deprived Hammond of the opportunity to present limited testimony on whether he consented to the search of the tattoo shop. Thus, the court heard only one side of the story and did not have an opportunity to determine whose testimony to credit: Officer Hofmeyer, who testified Hammond gave consent, or Hammond, who did not have the opportunity to testify that he did not. (See *People v. Wilson, supra*, 44 Cal.4th at p. 799 [“defendant could have taken the stand and refuted [an Evidence Code section 1108 witness’s] testimony, carefully limiting the scope of his testimony, and then objected to any cross-examination that sought information beyond the scope of his direct testimony”].)

The People argue that, “[h]ad [Hammond] taken the stand and established that he had standing to challenge the search of the tattoo shop, the record demonstrated that he consented to the search. Hence, there is no reasonable probability the outcome

would be any different.” The testimony Hammond sought to give, however, would have related to the issue of consent and may have contradicted “the record” that the officers obtained consent. We do not know what Hammond would have said had he testified, nor whether his testimony would have made a difference to the preliminary hearing court and the trial court. The People’s argument essentially assumes both courts would have ruled the same way regardless of how Hammond testified.

The preliminary hearing court’s error also affected the issue whether Hammond had a reasonable expectation of privacy in the tattoo shop, which the People argued in the trial court (but do not argue on appeal) Hammond lacked. It is unclear from the transcript whether counsel for Hammond was representing that Hammond would testify only about consent to search the tattoo shop or would testify only about the search of the tattoo shop in general, which would include whether he gave consent. Although at one point counsel for Hammond stated he wanted to put his client on “for a limited question as to whether he gave consent to search the shop,” counsel for Hammond also stated he wanted to have Hammond testify “for the limited purpose of the search.” Indeed, at the hearing in the trial court, the court and the parties all recognized that counsel for Hammond wanted him to testify both about consent and, in the court’s words, about “establishing privacy rights, possessory rights sufficient to hold a Fourth Amendment violation hearing,” and that the preliminary hearing judge had “warned [counsel for Hammond] that should you put your client on, he would be subject to additional inquiry other than just the limited purposes of the Fourth Amendment

possessory right.”³ Counsel for Hammond argued to the trial court that the preliminary hearing court “force[d] me to make a Hobson’s choice on the theory that I had to be subject to full cross-examination as to this entire incident when I only want to say I own the tattoo parlor.” The record reflects uniform recognition that, as Hammond argues on appeal, the “search of the tattoo shop involved several issues that [Hammond’s] testimony could have addressed, including [his] reasonable expectation of privacy in the shop and the validity of [his] consent”

To be sure, there was some evidence Hammond had a reasonable expectation of privacy in both the tattoo shop and the box in which the officers found the gun. For example, as noted, Officer Hofmeyer testified Hammond not only gave consent to search the tattoo shop, but also stated that anything the officers found there belonged to him. Although the preliminary hearing court granted Hammond’s motion to strike this testimony, the trial court granted Hammond’s request to withdraw the objection and allowed the testimony in the record.⁴ The People do not

³ The trial court asked, “Have I got everything right so far?” The prosecutor stated, “That’s our belief,” and counsel for Hammond stated, “I think everything is right.”

⁴ Although the People assert “[t]he record is not clear whether the trial court granted [Hammond’s] request to withdraw his *Miranda* objection,” the trial court’s ruling is pretty clear: “I’ll permit the defendant to withdraw his objection on *Miranda*. The statement comes in.” The People do not argue that the officers’ failure to give *Miranda* warnings did not render any consent by Hammond involuntary. (See *People v. Monterroso*

actually argue the trial court's ruling was erroneous; they argue only that, even if the trial court erred, the error was harmless because "the record demonstrated that [Hammond] consented to the search."⁵ Officer Hofmeyer also testified the officers had information Hammond was selling drugs from the tattoo shop and, as the trial court noted, the officers found paperwork inside one of the boxes containing a gun that had Hammond's name and address on it. But, because of the court's statements about the permissible scope of the prosecutor's cross-examination of Hammond if he testified, the court never heard from Hammond on the issue of who owned the shop and the items inside. We

(2004) 34 Cal.4th 743, 758; *People v. Ratliff* (1986) 41 Cal.3d 675, 686; *People v. James* (1977) 19 Cal.3d 99, 115.)

⁵ The People state in a footnote that "[i]t appears the trial court erred when it permitted [Hammond] to withdraw the *Miranda* objection he made at the preliminary hearing" because Penal Code section 1538.5, subdivision (i), provides that, where the defendant makes a motion to suppress at the preliminary hearing and renews the motion at a "special hearing" before trial, "unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing." The People forfeited the argument by raising it only in a footnote and only suggesting, not actually asserting, there was error. (See *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5; Cal. Rules of Court, rule 8.204(a)(1)(B).) And, as explained, Hammond's testimony about the search of the tattoo shop "could not reasonably have been presented at the preliminary hearing." (Pen. Code, § 1538.5, subd. (i).)

cannot conclude in advance, as the People ask us to do, that Hammond's testimony would not have made any difference.

Hammond had the burden to show he had a reasonable expectation of privacy in the tattoo shop and the boxes the officers seized there. (See *People v. Ayala* (2000) 23 Cal.4th 225, 255 [“the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable”]; *People v. Magee* (2011) 194 Cal.App.4th 178, 183 “[a]lthough [a] warrantless entry . . . is presumptively unconstitutional, in order to obtain suppression of the evidence discovered . . . on Fourth Amendment grounds, defendant had to show he had a reasonable expectation of privacy at the time of the warrantless entry”].) Hammond, however, did not have a full and fair opportunity to meet his burden because the trial court's statements suggesting it would not limit the scope of cross-examination precluded Hammond from testifying about the search of the tattoo shop—consent, ownership of the shop, ownership of the items in the shop—or at least increased the risk of doing so. (See *People v. Brooks* (1980) 26 Cal.3d 471, 481 [where the “defendant was deprived of an opportunity for a full hearing on the merits of his entire motion to suppress as initially made,” a “renewed hearing amounted to neither consideration of a second [Penal Code] section 1538.5 motion nor a relitigation of his original motion, but rather a completion of the full hearing to which he was entitled”]; *People v. Smith* (2002) 95 Cal.App.4th 283, 304 [“there are exceptions to that general rule barring reconsideration of suppression motions, including circumstances in which a defendant is denied the right to fully litigate the motion at a hearing”]; *People v. Ramirez* (1992) 6 Cal.App.4th 1583, 1589, fn. 4 [“a defendant is entitled to renew a suppression motion in the trial court . . . where defendant was not afforded a full and fair opportunity to litigate the issues raised in the original motion”].)

F. *Hammond Is Entitled to a New Hearing on His Motion To Suppress Evidence Obtained from the Tattoo Shop, and Perhaps To Withdraw His Plea*

The proper remedy for an erroneous denial of a motion to suppress, after which the defendant has pleaded guilty or no contest, is reversal of the judgment of conviction and, if necessary, remand. For example, in *People v. LeBlanc* (1997) 60 Cal.App.4th 157 the court, after holding the trial court had erred in denying a motion to suppress, reversed the judgment and remanded the case for the trial court to make findings related to alternative grounds for admission of the evidence. (*Id.* at pp. 167-168.) In *People v. Bowers* (2004) 117 Cal.App.4th 1261 the court, on transfer from the Supreme Court, after initially affirming the trial court's order denying the defendant's motion to suppress, reconsidered its decision after an intervening Supreme Court decision rejected the basis on which the trial court had denied the motion to suppress. (*Id.* at pp. 1263-1264.) The court in *Bowers* reversed the judgment and directed the trial court to hold a new evidentiary hearing on the alternative theories the People contended justified the search. (*Id.* at pp. 1272-1273.)

Here, the preliminary hearing court erred by effectively denying Hammond the opportunity to testify at the hearing on the search of the tattoo shop. Thus, we reverse the judgment of conviction and remand for the court to hold a new hearing on the motion to suppress. The trial court is to allow Hammond to testify about the search of the tattoo shop, including whether he consented to the search, with reasonable cross-examination limited to that issue or to any other issue on which Hammond

testifies.⁶ After conducting a new evidentiary hearing, the court is to rule on the admissibility of the guns discovered in the tattoo shop.

Hammond, however, is not entitled to withdraw his plea to the charge of possession of a firearm by a felon, at least not yet. The court must first rule on his motion to suppress the evidence of the guns found in the tattoo shop based on the evidence at the new hearing. As in *People v. LeBlanc*, *supra*, 60 Cal.App.4th 157, we are not ordering the exclusion of any evidence but are directing the trial court to determine whether evidence should be excluded after Hammond has the opportunity to testify. (See *id.* at p. 169.)

If, however, after the new hearing the court grants the motion to suppress the evidence of the guns seized from the tattoo shop, Hammond will be entitled to withdraw his plea to all three counts. (See *People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Ramirez* (2006) 140 Cal.App.4th 849, 854; *People v. Saldana* (2002) 101 Cal.App.4th 170, 176; see, e.g., *People v. Miller* (1983) 33 Cal.3d 545, 549, 552-556 [erroneous denial of a motion to suppress evidence relating to one of six burglary charges to which the defendant pleaded guilty required reversal of the judgment and vacating the plea upon a motion by the

⁶ We note the People introduced no evidence at the preliminary hearing that Hammond specifically consented to the search of the boxes found inside the tattoo shop. (See *United States v. Peyton* (D.C. Cir. 2014) 745 F.3d 546, 555 [“[w]hy a lack of privacy in the room implies a lack of a privacy interest in the contents of the containers remains a mystery”].) Hammond, however, does not argue that, even if he gave consent to search the shop, he did not give consent to search the contents of the boxes seized during the search of the shop.

defendant because “one plea bargain agreement” resolved all of the counts and it would be “impossible to determine” whether the defendant’s guilty plea to one count “was prejudiced by the tainted evidence”]; *People v. LeBlanc, supra*, 60 Cal.App.4th at pp. 169-170 [if the trial court determines on remand that any of the challenged evidence must be suppressed, the defendant must be “given the option of setting aside his plea and admission and proceeding to trial”]; *People v. Dyke* (1990) 224 Cal.App.3d 648, 662-663 [erroneous denial of motion to suppress with respect to a small amount of methamphetamine required reversal of the judgment because the judgment “was based on guilty pleas to various charges after his [Penal Code] section 1538.5 motion was essentially denied”].) On the other hand, if the court, after hearing the evidence, denies the motion to suppress, then the court should reinstate the judgment on all counts. (See *People v. Bowers, supra*, 117 Cal.App.4th at p. 1273 [if trial court determines the search was justified on an alternative theory, the court should deny the motion to suppress and reinstate the original judgment].)

DISPOSITION

The judgment is reversed and remanded for a new hearing on Hammond’s motion to suppress evidence obtained from the tattoo shop. If, after hearing the evidence, the court grants the motion, the court is to allow Hammond to withdraw his plea and

allow the People to refile the charges. If the court denies the motion, the court is to reinstate the judgment on all counts.

SEGAL, J.

We concur:

ZELON, Acting P. J.

SMALL, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.